UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, May 12, 2015
2:42 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

APPEARANCES:

OFFICE OF THE UNITED STATES ATTORNEY
By: William D. Weinreb, Aloke Chakravarty and
Nadine Pellegrini, Assistant U.S. Attorneys
John Joseph Moakley Federal Courthouse
Suite 9200
Boston, Massachusetts 02210
On Behalf of the Government

FEDERAL PUBLIC DEFENDER OFFICE
By: Miriam Conrad, Federal Public Defender
51 Sleeper Street
Fifth Floor
Boston, Massachusetts 02210
- and -
LAW OFFICE OF DAVID I. BRUCK
By: David I. Bruck, Esq.
220 Sydney Lewis Hall
Lexington, Virginia 24450
On Behalf of the Defendant

P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 2:42 p.m.)

THE CLERK: For a lobby conference in United States versus Tsarnaev, 13-10200.

Will counsel identify yourselves for the record.

MR. WEINREB: Good afternoon. Your Honor, William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Nadine Pellegrini, your Honor.

MR. BRUCK: Good afternoon, your Honor. David Bruck and Miriam Conrad for the defendant.

THE COURT: You've received a draft of 31?

MR. BRUCK: Yes.

THE COURT: We'll try to get you a draft of instructions hopefully by the end of the day as to progress. Both of them may be fine-tuned a little bit, but I think you'll get the general gist from them.

Let me just mention a couple of -- I don't want to go through all the potential instruction issues. If there are any, I think we can deal with them. So my proposal is we get together at 8:30 in the morning to do any last-minute business before the jury. I'd rather not take too much time, even out of the regular trial day. It's going to be a long process

anyway, so I'd like to get an earlier start and resolve things before we do that.

(Interruption in the proceedings.)

MR. BRUCK: I guess this is why we have lobby conferences in the lobby.

THE COURT: All right. I shut it off and I don't know how to turn it on. We're trying to solve the music problem, the music dipping in volume, and the IT people were working on it. So just speak louder. Sorry.

00:03 So 8:30 in the morning we can iron out any last-minute issues. Just to highlight a couple of those items, though, that I think are perhaps more important, I am not going to instruct on the effect of the lack of unanimity. They will have the option, obviously, to indicate they are not unanimous, but I'm not going to tell them what the effect of that will be.

MR. BRUCK: I recognize the Court has ruled, but could we be heard on this issue?

THE COURT: Well, you have. I mean, I've read the papers. And I appreciate that a number of courts have done it.

00:04 I read Judge Wolf's explanation in *Sampson*. I respectfully disagree with it. I think that the policy should encourage unanimity, encourage it to the extent it is possible conscientiously in each juror's sound judgment. And I think to suggest that this could be a truncated process by one juror simply deciding that the decision was his or hers I think

undercuts what is the process anticipated by the statute, so...

MR. BRUCK: Well, as a fallback position, your Honor, Judge Sand proposes a -- not in the form that we submitted, but in the form that is in his Instruction 9A-20 proposes an instruction which says that if the jury -- well, I'll just read it, because it both does not mislead the jury, or allow the jury to be misled, and requires unanimous verdict as to either verdict. And he does it in this way: He would tell the jury "If, after engaging in the balancing process I have described to you, all 12 members of the jury do not unanimously find beyond a reasonable doubt that the defendant should be sentenced to death, then you may not impose the death penalty," which of course is uncontroversial.

THE COURT: Right.

MR. BRUCK: "In that event, Congress has provided that life imprisonment without any possibility of release is the only alternative sentence available. If the jury reaches this result, you should do so by unanimous vote and indicate your decision in Section..." so forth of the special verdict form.

So it preserves -- it follows the -- what's really only a recommendation of *United States versus Jones*, but it doesn't have the terrible vice which is more present in this case than perhaps any other that has ever been tried under the Federal Death Penalty Act of coercing the jury into unanimity by causing the minority jurors to feel -- to assume, as they

will, that if they don't go over to the majority, this entire traumatic process will have to be repeated, and the victims and the family members and the government and the law enforcement and the entire community will have to go through this again because one, two or three jurors did not surrender their vote and go with the majority.

That's what the jury's going to think. And there's pressure in any case, and the law doesn't necessarily condemn that, but in this case the coercive effect of that misconception -- and it is a misconception -- is far more powerful than any -- any erroneous deadlock instruction or *Allen* charge that could ever be given in a normal criminal case. It will be overpowering. No one will have the ability to hold on to their conscientiously held belief in the face of that misconception. And of course it is a misconception.

So this proposal by Judge Sand is a middle ground, and it simply tells the jury, just as the jurors were told in voir dire -- and as the government was careful to point out, to jurors who were weak on the death penalty in voir dire -- that if it's not unanimous, you know, there's no death penalty, it says that. And then it says that if that's where you come to rest, then by unanimous vote indicate that the life sentence, which is the other alternative, is the option you've reached.

There is no misconception. It is accurate. It, as Judge Sand says in his comments, upholds the preference for

unanimous verdicts while at the same time not subjecting holdout jurors to that tremendous pressure which, as I say, will be exponentially greater in this case than in any other.

This is -- the case comes down to this instruction, I think. I mean, *Sampson* -- the *Sampson* case resulted in a death verdict even with this instruction. So it hardly makes, you know, the government's burden all that heavier, but it makes our burden extremely unfairly heavy because we have to overcome the false belief that if this juror can't agree -- if this jury can't agree, everything will have to start from the beginning again with a new jury.

The sense of public failure, of failing to do their job, of having been entrusted with this high responsibility for this community and having failed to discharge it, will be overpowering. And it's all based on a false assumption, that this case is like every other, when it's not. It's different from every other. So we really implore the Court to consider using Judge Sand's middle-ground instruction.

MS. CONRAD: May I just confer with Mr. Bruck for one second?

(Counsel confer off the record.)

MR. BRUCK: Thank you.

THE COURT: Anything from the government? No?

Well, I think the concern is addressed more properly at the -- with a very strong instruction about each individual

juror must give his or her own and not agree just to agree with others. I think that's the place where that danger can be satisfied.

MR. BRUCK: In that case --

THE COURT: It's a balance. I acknowledge. I mean, I understand the considerations, but I think they're considerations in the direction that I've been persuaded to as well, and so we'll...

MR. BRUCK: In that connection, defense counsel has planned to argue this point to the jury in argument.

THE COURT: No. That would be improper. If I am refraining from instructing on it, it's improper to argue on it.

MR. BRUCK: Well, if we may for the record have the record reflect that in addition to all the arguments that we've advanced in favor of the instruction, we also submit that ordering defense counsel from -- to refrain from informing the jury of the consequences of a deadlock has the further constitutional harm of violating the defendant's Sixth Amendment right under *Herring versus New York* to a full closing argument and the assistance of counsel at the -- in summation.

THE COURT: I don't think that could be true in the light of *Jones*.

MR. BRUCK: I must say that at oral argument one time on one of these *Simmons* cases, I was berated by Justice Scalia

for not having raised that precise claim rather than the claim I was actually raising. So I've resolved that next time we're going to raise it.

THE COURT: Okay.

I think the next thing I'd like to address is the government's -- which I think it's a recent -- second motion to strike or modify certain mitigating factors. I guess that was filed today?

MR. WEINREB: Yes, your Honor.

00:12 THE COURT: Last night? Today?

MR. WEINREB: We received the mitigating factors yesterday.

THE COURT: Yesterday. Okay.

MR. WEINREB: So we filed this today.

THE COURT: Though you have a response.

Let me say that I guess -- let me give you my disposition before hearing from people, is that what is identified as Mitigating Factor 19, which is this -- which is the proposition that if he's not sentenced to death, the only 00:12 other punishment will be imprisonment for the rest of his life without the possibility of release, I think we've talked about it in the past. I regard that as a proposition of law and not a factor to be proved. It is true, but I don't think it's something the jury has to consider. So I would be inclined to strike that.

As to the others, I think that the general structure and gist of the statute is to allow the defendant pretty much to propose anything that might be found to be mitigating, and I don't think there's -- should be much policing of those propositions as long as they're matters of fact that could be determined from the evidence. So I would be inclined not to strike anything else. If you want to come back at any particular one...

So the distinction I draw is between what is really not a mitigating fact but a mitigating proposition of law, on the one hand, which I think is not proper for consideration, and mitigating possible facts that -- as to which there would be dispute how mitigating they were if they were true, so...

MR. WEINREB: Well, your Honor, with that guidance in mind, although I think there's a very good argument that the cases make clear that mitigation may be broad, but it's not an empty vessel that you can just pour anything into. It's not a rubric for everything. I'll focus my attention on a couple of things, and that is the way that some of these are worded.

So we object to the way some of these are worded because they essentially state several propositions. They sort of bundle two or three propositions into a single mitigating factor, but they phrase one or two of them as if they're already true and then ask you -- ask the jury to find if the third is true. And that's an improper way of essentially

requiring the jury to assume the truth of something that they may not believe in. And I think it's unnecessarily confusing for the jury.

I think the best example is Number 12, which is on the bottom of page 1, says "Mental illness and brain damage. Disabled. Dzhokhar Tsarnaev's father." So that's a proposition of fact that the jury can either decide is true or not true. Then the next one says, "Dzhokhar Tsarnaev was deprived of needed stability and guidance during his
00:15 adolescence by his father's mental illness and brain damage." So Number 10 assumes the truth of Number 9. That seems to be improper. It's sort of saying to the jury, essentially, you have to accept the premise that his father had mental illness and brain damage and now you need to decide whether he was deprived of needed stability and guidance.

And furthermore, frankly, the fact that he was an adolescent in need of stability and guidance is itself a proposition that the defense may or may not have proved. I mean, when these crimes occurred, he was 19 years old and, in
00:16 the years leading up to them, he was arguably no longer -- he might not have been an adolescent in the jury's mind, or certainly not one in need of stability and guidance.

And so we attach to our motion a red-line version of these which proposes a way to basically re-list each of these as propositions, each one of which the jury has to find to find

that the mitigator's been proved by a preponderance of the evidence. That seems both clearer and fairer. Frankly, it tells the jury exactly what they're supposed to do as opposed to these which I think can be quite confusing to the jury as to whether, you know, they have to take the premise as given and just focus in on the ultimate conclusion or whether they're also being asked to decide whether the subsumed premises are true before they -- or in the course of deciding whether the conclusion is true.

00:17 So we'd ask for those rewordings. I think that's a fair request.

THE COURT: Well, okay. I mean, I understand the point. I think of the two possibilities you just posited, that I would rate it as the second; that is, the premise is put in the question as well. It's not given to the jury as a premise but they -- if they find the premise, then they can think what it means. But again, I think it -- my disposition is to permit the defendant to propose whatever factors he thinks might be mitigating and then see if he can persuade the jury, or some of

00:17 them, to that conclusion.

In other words, the authorship, I think -- within reason. I mean, I think it can be exceeded under certain circumstances, but I don't think that's the case here.

MR. WEINREB: The other ones that we object particularly to are 10 and 11, that his teachers and friends

still care for him and his aunts and cousins love and care for him, in part because of the main argument that we have been making, which is that it doesn't go to his character, his history or the circumstances of the offense. These are propositions about these people, what they feel about him, not about who he is or anything about him.

But more importantly, you know, these factors might as well have been read: His family and his teachers and friends don't want him to get the death penalty. They still see value in him. They want him to live. And if not that, then at the very least, that they will be impacted by his execution. And both of those are the types of arguments that courts routinely hold are not appropriate to put in front of the jury. In fact, we filed a motion in limine to exclude execution impact evidence. The defense said it wasn't going to put on execution impact evidence, and yet this is a way of trying to smuggle those issues into this case.

The fact that his teachers and friends still care for him today tell you that they're loving, compassionate people and that they are forgiving people, and they don't want to -- you know, no matter what he did, just as if your own son had done something, you might feel like no matter how bad it was, I can't bear to see him go to the gallows. And these people are like that. They were in loco parentis, or they are related to him.

But their feelings should not become a proxy for what the jury does. They're supposed to be trying to distinguish this murder and this murderer from others, and, you know, making a reasoned individualized judgment about him based on him, not based on what the impact's going to be on other people or what other people happen to feel today.

THE COURT: Do you want to address those two?

MR. BRUCK: I mean, it is clearly the significance of these that the unspoken part of these mitigating factors are based on their knowledge of him, based on how they remember him, based on what they know about him, they still care for him, they love and care for him. That does not have to be spelled out. That's obvious. That goes without saying. The reason it is a mitigating factor is it reflects well on him. And nobody is going to argue this, and I don't think any reasonable juror would interpret this to mean that the jury should weigh this as mitigating because of the effect on the people who feel this way. It's a way of talking about him.

We could rewrite these to make them extremely wooden and awkward by spelling all of that out, but that's not the way people talk, and I think we should just leave it the way it is.

THE COURT: Okay. I think we'll leave them in. I understand your -- essentially for the reasons that Mr. Bruck just mentioned.

The defense has a motion to strike the aggravating

factor concerning victim impact of Martin Richard's death. And I guess now there's been a recent government response to that?

MS. PELLEGRINI: There has, your Honor.

MR. BRUCK: Well, as the Court will recall, no evidence was presented other than some photographs of Martin Richard at the penalty phase, at the victim impact phase of the trial. The government stoutly denied all through the guilt phase that it was introducing victim impact testimony, and now we discover that its entire victim impact case, or almost all of it, or almost all that -- everything they point to regarding Martin Richard was actually introduced at the guilt phase.

If it was admissible at the guilt phase, it wasn't victim impact. One could only treat the record concerning Martin Richard as victim impact evidence if one takes the view that every time there is a murder, the defendant -- which obviously shows the impact on the victim, and inferentially on the people around him, that that ipso facto satisfies the evidentiary requirements for victim impact testimony under the statute. That's not what victim impact testimony is.

And for the government just to say that, Well, a tragic murder has been shown and, therefore, the -- it has met its burden to prove this factor beyond a reasonable doubt doesn't wash. They presumably had a case to present. In the end they, for whatever reason, did not call the witnesses and did not present them. And that's the end of the factor.

MR. WEINREB: Your Honor, evidence introduced during the guilt phase can serve more than one purpose. Evidence in the guilt phase is admissible in the penalty phase. Many of the aggravating factors we're going to prove in the penalty phase were already proved in the guilt phase. Mr. Bruck has made that point innumerable times in trying to block us from putting in evidence at the penalty phase.

As for whether there was actual evidence of impact on the Richard family, it would be one thing if -- sometimes a decedent could have no survivors. It could be an anonymous person found in a ditch. Sometimes a decedent -- it may be that all the family members of a decedent find it too painful to testify for one reason or another. That's not the end of the story.

In this case the jury heard from the defendant's father and --

MS. CONRAD: Victim's.

MR. WEINREB: I'm sorry? Heard from the decedent's father.

And they saw images of the decedent, they heard about the suffering that the decedent himself went through. There was plenty of evidence from which the jury could conclude that this had a profound impact on Martin Richard and on his family and friends. It doesn't have to be the kind of presentation for one witness that it is for another witness.

THE COURT: Well, okay. I essentially agree with the proposition that evidence can serve multiple purposes, and there is evidence in the record which the jury is entitled to consider which would support a conclusion about the impact of Martin Richard's death on his family properly.

I would propose to send the same redacted indictment to the jury room just for their reference purposes. Is there any objection to that?

MR. WEINREB: No.

00:24 MR. BRUCK: No, sir.

THE COURT: I do not propose to send the government's notice of intent which outlines the aggravating factors. The aggravating factors will be first summarized by me. They will again get a copy of my oral instructions. They are extensive and it will be important for them to be able to go back and review them. And in addition, the verdict slip will have relevant aggravating factors set out, so I don't think there's any reason for the notice of intent.

MS. CONRAD: May I have one moment, your Honor, to

00:25 confer with Mr. Bruck?

(Counsel confer off the record.)

MR. BRUCK: I assume that the wording of the aggravating factors, statutory and non-statutory, will be exactly the same as they were in the notice? The -- I mean, the government is bound by the notice that they gave and --

THE COURT: I'd have to check. I mean, I think in preparing the verdict slip we relied principally on -- or substantially, I guess I should say, on the defense proposal and Judge Sand, and we copied the language from those sources without checking it against the notice of intent. I don't know how much substantial difference there is in the formulations.

MR. BRUCK: I'm actually referring to the non- --

THE COURT: Oh, non-statutory?

MR. BRUCK: The non-statutory factors. And the slip I think tracks them exactly, and we're just assuming that that will continue to be true.

THE COURT: I think so but I'd have to check.

MR. BRUCK: Sure.

THE COURT: But it's the statutory -- sometimes it's the statute's language, sometimes it's a slight modification of the statute's language, so...

MR. BRUCK: Sure.

THE COURT: I understand you've been working to harmonize exhibits, et cetera, and that the physical exhibits have been made available for the jury and have been reviewed?

With respect to closing arguments: First, if you haven't, I hope you will exchange whatever demonstratives you intend to use just so if there's any issue, we can deal with it before it's shown to the jury. I mean, it has to be something in evidence so I doubt it will be a problem, but I just mention

that.

MR. BRUCK: We did have a couple of issues respecting -- of course we have filed a motion respecting improper forms of argument and we trust that none of those will be made. I had inquired of Mr. Mellin yesterday whether he still intends to do that which he said he was going to do, which is to display the clothes that young Martin Richard was wearing. He did not respond to my email. That was an attempt to determine whether or not there was a need for a motion.

00:28 On the assumption that silence is not consent, we do wish to move that the Court bar the government from displaying those clothes. You've seen them displayed already. You know what I'm talking about. I know the evidence is in evidence, but there is an inflammatory effect from these particular items of evidence which is difficult for words to convey. It's been done once, and we just think that in closing argument in a case of this nature, the waving -- literally waving the bloody shirt is inappropriate, inflammatory, and the Court should not allow it.

00:29 Now, it could be that Mr. Mellin doesn't plan to do it, but since I didn't get an answer, I don't know. So I wanted to make the motion.

MR. WEINREB: Your Honor, it's my understanding Mr. Mellin does intend to do it. And I think there's no merit whatsoever to that argument. The clothes are in evidence. It

would be odd, indeed, if the government could put something into evidence and then was precluded from showing it or highlighting it to the jury. That's the whole purpose of closing argument, is to distill for the jury what the government believes is the most important pieces of evidence in the case and to weave them together into a narrative that helped to bring all of the evidence together.

It would be one thing if the government intended to display them in some kind of misleading way. I could see a motion in limine to prevent the government from blowing them up on a giant screen or from enhancing them in some way or anything like that, but the bare evidence itself is by definition a proper matter for the jury's consideration. And the jury may well be inhibited from handling these things because they're -- you know, they're biohazard to some degree, you need to wear gloves to handle them. And it's perfectly appropriate for the government to display them.

And furthermore, they've been displayed before. One could easily take the opposite instinct that Mr. Bruck voices may also be true, that the impact of these kinds of things diminish with repetition. So I don't think it's self-evident that showing them to the jury will somehow magnify any kind of impact that it previously had. They've seen them before.

But it is an important part because one of the main arguments that the government -- many of the aggravating

factors in this case depend on the government proving that this was not just any old murder. This was a murder done in an especially cruel, heinous and depraved fashion. This was a murder committed with a device that can permanently disfigure people. This was a murder done with a device that has a grave -- poses a grave risk of death to other people because of the manner in which it kills.

All of those things are the very things that we have to prove in this phase. And so a vivid piece of evidence that helps to compactly make some of those points is precisely the kind of thing we should be allowed to show the jury.

THE COURT: Okay. Okay. I don't think it should be used. I agree with Mr. Bruck's argument. It is in evidence. It can be examined if the jury wants to. I don't think there's anything wrong with Mr. Mellin referring to or describing the evidence, but I do think that the emotional content so outweighs the rational value added that it is -- there's too strong a possibility of inflaming the emotions of the jury at a critical time in the case with very little intellectual content that cannot be easily otherwise used and displayed.

MR. WEINREB: As an alternative, could we use the photograph of it? That's less impactful, it's --

THE COURT: I'll look at the photograph, I guess. I think I'm inclined to say yes.

MR. WEINREB: I think there is a photograph.

THE COURT: It's the physical --

MR. WEINREB: Yeah.

THE COURT: I mean, the problem is you imagine the boy's body in the clothing in a way that is just too emotional, I think.

MR. BRUCK: Mr. Weinreb's argument brought me to the second part of this motion which was when he said, "Well, we're not blowing it up," that reminded me of the display of Martin Richard's autopsy photographs where they did blow up the severed arm and the tendons and the shredded muscle and magnified it.

MS. PELLEGRINI: We only magnified it on the screen.

MR. BRUCK: On the screen.

And we have the same objection to autopsy photos, any of the victims being displayed in closing argument as we did to the clothes of the young Richard boy, and for the same reasons. And in particular, the autopsy photos of Martin Richard.

MR. WEINREB: So we don't intend, either Mr. Mellin or I, to use any of the autopsy photos except one which is the photo of Sean Collier. He -- I think even in the defense's initial motion to exclude autopsy photos in general, the motion -- there was no motion to exclude the Collier autopsy photos because it was not a full-body photo and it didn't show what the defense described as unusually gruesome damage. It's bullets wounds which is something a little more common that

people see.

So we would ask leave for that one photo which also is in evidence. It's not blown up and it's a clean -- it's a bloodless photo.

THE COURT: All right. I think that's fine.

So the defense has filed the motion yesterday, I guess, regarding a series of topics -- possible topics that might be included in closing argument. I guess my inclination would be to ask the government to review that and those topics and tell me if there is any intent to use any of those matters in any way that we need to address; otherwise, I'll take silence as indicating that they're not going to be proffered and we don't need to address it.

MR. BRUCK: We do have one more to add to the list, your Honor, which I should have included but I think is very likely to be heard if nothing is said about it, and that is the argument: If not in this case, when, which is an argument which is improper for a number of reasons --

MR. WEINREB: We won't be making that argument.

MR. BRUCK: Okay. Well, then that takes care of that.

MR. WEINREB: May we have a moment, your Honor?

THE COURT: To look at those?

MR. WEINREB: Yes, if you don't mind.

(Pause.)

MR. WEINREB: So with respect to many of these, I'll

just say -- first of all, we oppose in general a motion in advance to preclude the government from engaging in prosecutorial misconduct. That's a specious kind of motion and it's dangerous because we're not flyspecking the exact words of every one of these things. I mean, these things are always subject to interpretation. It also would seem to excuse the defense from making contemporaneous objections to anything it finds objectionable, and they should not be permitted to do that for reasons we said before. The Court can't correct
00:35 something, sustain an objection, give a limiting instruction or anything like that without a contemporaneous objection.

So we -- for all those reasons we would ask that the motion not simply be handled in this way but it be denied without prejudice with instructions to the defense to raise any objections in the moment that they might have...

With respect to some of these things, like urging the jury to ignore or disregard legitimate mitigating evidence, suggesting that mitigating evidence requires a nexus to the crime or the defendant's culpability, we understand that if the
00:36 Court deems something to be a legitimate mitigating factor, it's not for us to tell the jury it's not potentially -- it's not a legitimate mitigating factor if they find it, by if it's proved. But the government does intend to argue that some of these mitigating factors deserve no weight. That's a different story from saying it's not a mitigating factor. I just want to

make that clear. And I think it is proper to argue that a mitigating factor with no nexus to the crime deserves less weight than one that has a nexus to the crime, for example.

(Pause.)

MR. WEINREB: Well, suggesting additional evidence beyond that adduced at trial, that's a routine argument that lawyers sometimes make during closing arguments that there's no evidence of that. And courts almost always instruct the jury that it's their memory of the evidence that controls, and the argument will just fall flat if the jurors find that there is no evidence of it. So we would object to that one specifically.

The denigrating defense counsel -- or the defense, that's another one where lawyers very often call into question whether the other side has actually proved something or that sort of thing. We object to that one in particular. That's the kind of thing which is very subject to interpretation, and there's room for argument over what would count as unfair or impermissible denigration. We're all experienced attorneys here. I think we know how not to cross that line.

And then commenting on the alleged costs or alleged comforts of life imprisonment, obviously, we won't be commenting on the alleged costs, but the alleged comforts is another matter because I believe the defense has introduced as a mitigating factor something we object to, which is that the

government has the power to severely restrict Dzhokhar Tsarnaev's communications with the outside world. That's his proposed Mitigating Factor No. 21.

We've taken the position from the outset that arguments about what the Bureau of Prisons can or can't do are not individualized to this defendant. They're true for every murderer; and, therefore, they do not provide a rational basis to assist the jury in reaching a non-arbitrary, non-capricious sentencing judgment. Whatever they say -- whatever they

00:39 -- this would be true for every murderer in every case and, therefore, doesn't really help them. Furthermore, it has nothing to do with his character, his history and so on.

The Court, however, has let in a lot of evidence. Having done that, and now having allowed the defense to list it as a mitigating factor, I assume we're going to hear argument about it from the defense. Many of the things that the jury heard about in the course of that back-and-forth could be described as comforts for the defense. Having communications with family, with friends, with being able to write a book,

00:40 being able to educate himself so that he can write a better book, I mean, all of these things can fall under that rubric.

So we won't refer to anything not in evidence, but I think everything that is in evidence should be considered fair and that's why it was allowed into evidence in the first place.

MR. BRUCK: If I may, we had something rather specific

in mind. The Court, for example, ruled in no uncertain terms at sidebar that the government was not to introduce evidence concerning television, and that the way the issue -- the closest the government was permitted to do, and I think I'm quoting the Court verbatim, was that it would be permissible to say that the defendant -- that the defendant had available -- could have prison -- could have prison programming in his cell. And when the question was put by Mr. Mellin, it had changed into, "Can he view prison programming in his cell?"

00:41 THE COURT: "Watch" I believe was the word.

MR. BRUCK: Or watch?

It was -- and this was after the particular question had been asked of the Court, "Well, can we mention the TV?" and you said no. So it got in anyway.

So we're trying to be a little careful. We think that the argument is likely, given the track record, to strain against the Court's rulings exactly as the examination of the witness did. And that's what we're talking about. We don't think that the Court's ruling should be flouted and we think

00:41 the Court should enforce its ruling.

MR. WEINREB: So, your Honor, there was no mention of television in the question or in the answer. But "programming" is not a thing. In fact, I don't even know if the jury has any idea what "programming" means. It's a term of art.

THE COURT: I think they heard a little bit about it

from Mr. Bezy.

MR. WEINREB: Well, perhaps. But in any event, the only way for them to have any conception of what it means to "have programming in your cell" as if it were a thing that they can sort of pass you through the door, it sits in the corner, is if they understand that having programming in your cell means watching programming. I can see why Mr. Mellin asked the question that way. It's almost -- it makes no sense to ask it in any other way.

00:42 THE COURT: Well, I think he went too far, frankly, on it. I think he went over the line. Actually, "viewing" would have been less offensive because that could have been a book or papers or something like that. But "watching," I think, was a deliberate, I have to say, suggestion of television, which I think was inappropriate.

Now, so let me just say more broadly, we're obviously at a critical stage of the case and it will be vigorously argued by both sides but we have to stay within the lines, both sides. We've come too far in this case to have something

00:43 happen that does make what Mr. Bruck feels is unthinkable, and that is a retrial. I just urge everybody to keep that in mind.

MR. WEINREB: Well, your Honor, I'll bring that message back to Mr. Mellin who will be making the argument. I hope the message applies equally to the defense and particularly about this issue that they feel so passionate, a

deadlocked jury.

THE COURT: It does. Anyway, so I think that may be it for today unless there's something.

MR. BRUCK: We've got a couple more things. We could do it in the morning but I think --

THE COURT: We can actually dispose of it now.

MR. BRUCK: -- if the Court has more -- will bear with me, we made a motion way back last year to strike the selection of the marathon non-statutory aggravating factor as duplicative

00:44 of or encompassed within the substantial planning statutory aggravating factor. We -- the Court did not grant that motion at that time. We don't see this -- I realize the Court has told us to put our Rule 29 type motions in writing, and we still can do that, but I didn't really see this as a Rule 29 motion; it's a question of whether, sort of as the government has just done, whether there is -- the factors to be submitted to the jury in some way overlap or encompass one another.

And we really think that that non-statutory aggravating factor is -- relies entirely on facts which are

00:44 also there to prove the substantial planning to cause the death of another person or -- and to cause an act of terrorism. It's a two-part aggravating factor. The government has alleged both parts here. And the way that was done was to attack the marathon according to the non-statutory aggravating factor.

Of course there are many ancillary facts involved with

the marathon, but those are the facts which make this, according to the government, an act of terrorism. And that is the statutory factor. So there really isn't any daylight between the two factors. It allows double counting.

And for the reasons that we briefed in the motion to strike, we think that now the evidence is in, the Court should only allow one or the other of those factors.

THE COURT: Okay. I think they're distinct factors.

MR. BRUCK: We have just drafted, and I'd like to hand to counsel and pass up to the Court, a very short curative instruction dealing with this problem of the modification of the SAMs by the Court. So if I may.

00:46

(Curative instruction handed up to the Court.)

MR. BRUCK: As the Court will notice, the focus at sidebar was whether the statement was accurate or not, and the Court concluded after consulting the clerk's notes that you felt that it was. We accepted that ruling. But the focus here is not on whether it was accurate but whether it had any relevance to any issue in the case because of the fact that the entire subject matter of the controversy about the SAMs or the -- the only part that had any traction at all was having to do with the ability of defense counsel to prepare their case with the assistance of the defendant.

00:47

And that becomes moot. We're talking about postconviction. And we're talking about postconviction when he

receives a life sentence where there will truly be little or no future litigation ever, and certainly none that will implicate these issues. So we think it is only fair for the jury to know that's water under the bridge and -- whatever happened, and that it shouldn't be taken as some indication that the Court is going to issue rulings or exercise continuing jurisdiction over whatever SAMs may be renewed or imposed if this young man is sent to prison for life.

MR. WEINREB: So, your Honor, the defense decided to open the door to a discussion by witnesses on the witness stand about a process that is largely a legal process but also it's a process that occurs behind closed doors in the Department of Justice involving communications among various branches, not something easily explained to the jury from the witness stand. But he decided to do it.

And then he called to the witness stand Mr. Bezy, a witness who really did not know what he was talking about, gave testimony that I think was obvious to everybody in the courtroom was based on virtually nothing more than a conversation he had had two days earlier with Ms. Nicolet who actually does know what she's talking about, and then regurgitated as much of it as he could or that he knew.

Then when the knowledgeable person was on the witness stand, the defense asked her on cross-examination the question that elicited the answer to which he now wants a curative

instruction to be given, an answer that as far as the witness was concerned was an absolutely true answer and that the Court acknowledged up on the stand that she had a good-faith reason for believing was a true answer.

Now what he wants to do is he wants to single -- the Court said up at the witness stand -- I'm sorry. The Court said at sidebar that the back-and-forth among the witnesses on this issue had been somewhat illuminating and perhaps somewhat confusing, but that in the matter of the way things often
00:49 unfold in court, the jury had gotten a mix of input and was in a -- things had been sort of left in equilibrium, and it was in a good situation to draw its own conclusions.

What the defense wants to do now is single out a particular fact that he considers bad for him and have the Court instruct the jury so that it's no longer even up to them to make these judgments, what matters and what should matter to them, what's true and what isn't true. That's just not fair. If we had known this was coming, we would have had our own curative instruction that emphasized the points that we think
00:50 are favorable to us. It's just not how these things should be handled, back and forth like this, with asking the Court to tell the jury what they should believe and shouldn't believe and so on.

Personally, I believe this is misleading. The defendant could have plenty of litigation. People who are

sitting in life in prison often have nothing to do, as the Court well knows, but file 2255 motions. And he may well have plenty of legal representation in prison and there may be plenty of issues involving modifications of the SAM.

This Court could get involved again if there's a retrial or an appeal or any number of reasons. It's simply not a fair or appropriate thing to do.

MR. BRUCK: If I could just -- the missing fact, without agreeing with any of Mr. Weinreb's characterizations, the important fact he left out is when Mr. Watkins interviewed Ms. Nicolet two days before, he got the opposite answer, that she never heard of a modification of a SAMs ordered by a court. That's the only reason he asked the question.

So I don't think it's really fair to say that we invited this. Well, that's what happened.

THE COURT: Well, I'm inclined not to do it. You just proposed it. I haven't thought about it for very long. I will think about it a little more, but my current inclination is not to use it.

MR. WEINREB: There were two other defense requests for instructions.

MR. BRUCK: Oh, well -- Mr. Weinreb points out that we had a total of five --

THE COURT: Right.

MR. BRUCK: -- supplemental requests.

I took the Court to be saying that we'll get the answer on that shortly.

THE COURT: You're right.

MR. WEINREB: Okay.

THE COURT: I think most of those I have done something with and they're in there and you'll see what I have done.

MR. WEINREB: Very well.

MR. CHAKRAVARTY: Your Honor, one thing I should have raised when you asked whether the parties had exchanged exhibits. We have. We think we're in a pretty good place. Just one issue that we're going to have time tomorrow to resolve expeditiously, so I wanted to get ahead of it is that with regard to some of the computer exhibits that the defendant introduced, some of them are not JERS compliant so they're going on to the stand-alone computer, like the government exhibits and all of that is worked out. However, some of them appear to not be on the stand-alone computer, so it looks like they're kind of bifurcated. So some are on JERS and some are on the stand-alone computer.

The government doesn't think that's ideal. The government thinks they should be in one place. The other risk it creates is one of double-counting, like there might be exhibits in both places, which we want to avoid. Mr. Fick, I think, is the most knowledgeable on this. And I don't know

what the status is currently but I know that's a concern which I'm alerting the Court because if the Court has a preference one way or the other, then it's best to tell the parties now.

THE COURT: No. My concern is if the jurors want to see a particular exhibit, they know where to go to get it. That's my concern. I don't really care if those of a feather flock together or not. But my interest is in assisting the jury in their job. And if there's an impediment to that, then I'm concerned about it. If it's just a quirk of indexing or something, then -- but doesn't substantially interfere with their ability to find what they want, then I am less concerned about it. It would be nice -- perfection is nice but -- you know, we've had the problem both with respect to compatibility with the system and volume in this case that is maybe a new experience for jurors and its custodians. And so they're doing the best they can.

But I believe that I have been assured the jurors will have a master list of the exhibits and they will know where to look if they're looking for something.

00:54 MR. CHAKRAVARTY: Okay. Thank you.

MR. BRUCK: I have one -- go ahead.

MR. WEINREB: I just had a very brief thing. Inquiring minds are again asking me whether the Court's given any more thought to when the sentencing hearing will be regardless of whether we have a death verdict or a life

verdict.

THE COURT: No, other than what we talked about. I mean, and -- well --

MR. WEINREB: We're still hoping for somewhere in the order of 30 to 60 days.

THE COURT: Yeah, I've been having in my mind July. Mid-July.

MR. WEINREB: I'm sorry? Mid-July?

THE COURT: Mid-July.

00:55 By the way, I have jury duty on July 14th at Suffolk Superior Court, so it won't be that day.

MR. WEINREB: The only concern we have is the scheduling of -- whether victims can be here or not. Can we take a moment to -- I mean, not a moment, but -- well, why don't we vet that --

THE COURT: What's your concern, summer vacation?

MR. WEINREB: Exactly.

THE COURT: Well, you know, it's not a perfect world and --

00:55 MR. WEINREB: I understand.

THE COURT: -- I don't know that you can -- the alternative would be to put it off until September.

MR. WEINREB: No. No, we would be thinking June. Late June, for example.

THE COURT: Well, it depends. I mean, I'm not sure I

should be doing this speculating on the record, but if there were a death penalty verdict, for example, I would expect that we would probably see a motion for a new trial or something of that sort, okay? That will take some time to resolve, presumably, and so the sentencing would have to await that and whether -- and that might be an uncertain schedule, okay?

On the other hand, if the judgment is in the other direction and a life sentence, I expect there will not be a motion for a new trial and things can be scheduled sooner rather than later. So we're really operating in a range. So I guess the possible range is maybe mid-June to late July, is the target window.

MR. WEINREB: We'll stick with that. We just need to say something to the victims who are inquiring.

THE COURT: Mr. Bruck?

MR. BRUCK: If you'd bear with me just a moment.

(Counsel confer off the record.)

MR. BRUCK: I had one procedural question. We've been filing requests to charge, memoranda, exhibits, informally with the Court. I can't say for many of these I could come up with a justification for sealing, and I would propose to go ahead and file them all on the public docket, but if the Court would prefer we not do that, then we won't.

THE COURT: No. No. No, I think for proposed verdict slips, proposed instructions, those are all matters for the

public record, it seems to me.

MR. BRUCK: Very well. We'll go ahead and just file them.

THE COURT: Okay. Thank you.

THE CLERK: All rise for the Court.

(The Court exits the courtroom at 3:38 p.m.)

THE CLERK: The Court will be in recess.

(The proceedings adjourned at 3:38 p.m.)

C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

Date: 5/22/15